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Cc: "Belin, Letty" [Letty_Belin@ios.doi.gov]; Robershotte, Paul J SPD" [Paul.J.Robershotte@usace.army.mil]; N=Karen Schwinn/OU=R9/O=USEPA/C=US@EPA[]
Bcc: "Monroe, James" [James.Monroe@sol.doi.gov]; Allen, Kaylee" [Kaylee.Allen@sol.doi.gov]; ichael.s.jewell@usace.army.mil [michael.s.jewell@usace.army.mil]; ichael.G.Nepstad@usace.army.mil [Michael.G.Nepstad@usace.army.mil]
From: CN=Tom Hagler/OU=R9/O=USEPA/C=US
Sent: Thur 6/16/2011 5:56:08 PM
Subject: Purpose and Need - Let me refresh your memory...

Given that this discussion seems to be morphing from a question of "signing off on the P+N" to one of "signing off on alternatives," I am enclosing two emails on that same topic when it came up a month ago (mid-May of this year). The first email is Mike Jewell's (Corps Regulatory) response. The second is Karen Schwinn's coterminous response, both addressed to you. They are similar but not identical responses.

I think there is a way forward through this in the near term, but it needs to consider a couple of important points:

(a) DOI needs to respect the Corps' need to have some basis, some record, to make any kind of finding at this point. The Corps is the entity that will be sued on its permitting action. This is tricky because the alternatives, at least according to Jerry Meral yesterday, are not yet completely set. And none of this has been submitted to the Corps (I'm fairly certain that is correct, but check with your Patti I.). So the level of assurance DOI will get will necessarily be conditional. On the other hand, given how many alternatives are on the table right now, it may be possible to make some kind of statement along the lines of "at this point, it appears that the LEDPA is within the range being evaluated."

(b) Karen's response flags a wholly separate issue. This one is at first brush a NEPA issue but it may also implicate 404 permits for site-specific HCP actions. Here's the issue: The action agencies, for good or ill, have defined this exercise as two projects, an HCP project and a water conveyance project. The "alternatives" being discussed in the public fora are solely on conveyance. Ordinarily, when we have seen EISs for HCPs, there are alternatives for the HCP. Where are the alternatives for the HCP in this effort? Something to discuss as we work through that, although this one isn't quite as time sensitive as your conveyance alternatives, given your process. But you need to think about it; this question is inherent in the NAS critique.

OK,, here are the two emails. The first is one that went from Mike Jewell to you, and you sent it to Karen who sent it to me:

----- Original Message -----

From: Karen Schwinn
Sent: 05/16/2011 07:15 PM EDT
To: Tom Hagler
Subject: Fw: BDCP Alternatives, NEPA and Corps Permitting

David and Patti:

Thanks for giving us an update on Friday May 6, 2011 regarding the status of the BDCP EIS/EIR for permitting under Section 10 of ESA. DOI provided a verbal summary of alternatives being considered by the BDCP Executive

Committee for evaluation in the EIS/EIR. DOI also indicated May 19, 2011 as the date by which the Executive Committee plans to finalize the range of alternatives to be analyzed and requested the Corps identify any questions/concerns about the alternatives before then.

As you know, as part of our pre-application discussions, the lead federal agencies, EPA and the Corps have been considering whether a NEPA/Corps permitting MOU would be appropriate and useful in advancing permit decisions for the BDCP. The Corps has used similar MOUs with other agencies, including CA High Speed Rail and Caltrans, with success. On May 5, we met and agreed that development of such a "NEPA/404 Integration" MOU is important and would continue. As a follow-up to the meeting, the Corps developed an initial draft MOU and on May 12 routed it to agency representatives for review and comment. The MOU is focused on the major decision points for the Corps aligned with NEPA. These points include concurrence on:

1. Project purpose
2. Range of alternatives to be evaluated in the NEPA document
3. Preliminary LEDPA
4. Compensatory mitigation plan.

These steps are identified as checkpoints to either reach agency agreement or elevate specific issues to higher management levels. The agency representatives will be meeting May 25 to discuss comments and advance the MOU.

We would like to continue pursuing an MOU so that we can collectively establish a reasonable process for ensuring the BDCP EIS/EIR includes sufficient information on which to make permit decisions. DOI's recent request for input from the Corps (and EPA) regarding the range of alternatives to be considered in the EIS/EIR is not consistent with pursuing such an MOU. We are concerned that the lead federal agencies, EPA and the Corps have not agreed on the project purpose statement, and now are being requested to provide input on the range of alternatives based on minimal information by May 19. Establishing an MOU outlines information requirements and timelines to be followed by all signatories for each checkpoint.

We acknowledge that there is no requirement that lead federal agencies or permit applicants to engage in pre-application consultation or integrate the Corps permitting process with BDCP NEPA. However, without an MOU, the default process includes the Corps evaluating project information only after receipt of a complete permit application, potentially requiring additional alternatives to be analyzed and supplemental NEPA documentation. Instead, the Corps supports integrating NEPA, ESA, Rivers and Harbors Act of 1899 and Clean Water Act processes and compliance to avoid delays which could result from sequential project review, additional NEPA analyses and difficult permit decisions.

We cannot provide you comments on the possible alternatives under consideration because we have not been provided sufficient information on any of the alternatives to express an opinion on their adequacy for compliance with NEPA, Clean Water Act, or the Rivers and Harbors Act. It would be helpful at our May 25 meeting to assess where the lead agencies and regulatory

agencies believe the BDCP EIS/EIR process stands at this time and to reconfirm a collective decision on pursuing an MOU.

Michael S Jewell
Chief, Regulatory Division
US Army Corps of Engineers, Sacramento District

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Here's the second email, that went from Karen to you:

----- Forwarded by Tom Hagler/R9/USEPA/US on 06/15/2011 01:58 PM -----

From: Karen Schwinn/R9/USEPA/US
To: "Nawi, David" <David_Nawi@ios.doi.gov>, "Idlof, Patricia S" <Pidlof@usbr.gov>
Cc: "Castleberry, Dan" <dan_castleberry@fws.gov>, "Barajas, Federico" <FBarajas@usbr.gov>, "Nepstad, Michael G SPK" <Michael.G.Nepstad@usace.army.mil>, Michael Tucker <Michael.Tucker@NOAA.GOV>, "Fry, Susan M" <SFry@usbr.gov>, Tom Hagler/R9/USEPA/US@EPA, Erin Foresman/R9/USEPA/US@EPA, "Jewell, Michael S SPK" <Michael.S.Jewell@usace.army.mil>
Date: 05/17/2011 04:19 PM
Subject: Re: BDCP EIS Alternatives

David and Patti -

Thanks for your recent verbal update summarizing the alternatives that the BDCP Executive Committee is considering for analysis in the NEPA/CEQA document. From that conversation (on May 6), I understand that the Executive Committee would like to finalize the range of alternatives to be analyzed in the BDCP NEPA/CEQA document at their May 19 meeting. You requested that EPA and the Corps identify any questions and concerns about the alternatives before that meeting. I'm sending this to support and supplement yesterday's email response from Mike Jewell of the Corps.

Given the complexity of this process, we thought it would be useful to begin our comments by identifying the status of the environmental analysis for BDCP as it relates to probable Clean Water Act 404 permitting for which the Corps is responsible and EPA maintains an oversight role. As Mike's email mentioned, we have participated with the Corps (as the lead 404 permitting agency) in "pre-application consultations" with the lead federal agencies (FWS, NMFS, BOR) and DWR. The Corps and EPA will occasionally engage in extensive pre-application consultations with probable permit applicants for complex projects to help them consider permitting requirements early in the process and avoid proposing a project that does not qualify for a Clean Water Act Section 404 permit.

Although several pre-application discussions have occurred over the last year, it is our understanding that an applicant has not been identified, no application has been submitted to the Corps, and no agreed-upon project definition has been presented to EPA and the Corps. Therefore, for all the reasons Mike's message discussed, we echo the Corps' suggestion that we pursue an MOU to agree on timelines for information requirements, checkpoints and elevation procedures.

Even though your May 5 request for input regarding the range of alternatives is out of step with pursuing a NEPA/404 MOU, we offer a few preliminary observations:

- We have difficulty commenting on alternatives when we don't have an agreed-upon project purpose and have not been provided sufficient information for evaluating project alternatives. In addition, there seems to be confusion about the BDCP purpose, as described in the recent NAS report (see page 3). And we think there is a disconnect between the proposed alternatives, all of which focus on conveyance, and the stated ecosystem

restoration purpose of the BDCP. If ecosystem restoration is one of the major project purposes, we would ordinarily expect to see a more robust discussion of alternatives for that purpose.

- We are encouraged to learn that the range of alternatives considered by the Executive Committee for evaluation in the BDCP NEPA/CEQA document has expanded since the range described in a June 15, 2010 power point presentation developed by the Delta Habitat Conservation and Conveyance Program. Specifically, we understand that the Executive Committee added smaller sized conveyance and a yet-to-be-defined increased outflow alternative for evaluation under NEPA. However, we cannot comment on their potential for meeting CWA permit restrictions or the NEPA requirement for considering a reasonable range of alternatives at the current level of detail. To date we have received: 1) a power point presentation, 2) a table describing operations from February 2010, and 3) a verbal description of the additional 3,000 cfs, "Scenario 6," and increased outflow alternatives from the lead federal agencies.

- We consider water operational scenarios (diversion volume, timing, and frequency alternatives) a major element of each conveyance alternative and note they are the potential source of substantial impact to aquatic resources regulated under CWA Section 404. As we have not seen a detailed description of the operations scenarios or the modeling information associated with these operational scenarios, we express no opinion on their adequacy for 404 NEPA compliance purposes.

The federal agencies are meeting May 25th to discuss 404 issues. It would be useful at that meeting to assess where the lead agencies and regulatory agencies believe the BDCP EIS/EIR process stands and to reconfirm a collective decision on pursuing a NEPA/CWA 404 MOU of some sort.

Thank you for your continued efforts to coordinate these complicated issues within the federal family. I'm sure we'll talk more about this soon..

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